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91-1250

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1991

RICHARD J. McALLAN,

Petitioner,

vs.

JAMES T. KERR, et al.,

Respondents.

(Full Caption Infra)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW:

1. Under the First Amendment protected speech component, does an employee of the executive branch of government, testifying before state and city council legislative oversight committees on matters of public concern, have a duty to respond to questions posed, in a manner conforming to the political objectives of the employer, upon pain of adverse personnel action?

2. Are adverse personnel actions by a municipal employer in response to efforts of an employee, who was also a union officer, to correct illegal employee classifications by the employer through state court action, and who interacts with the media on matters of public concern, and who institutes labor grievance proceedings in administrative agencies, and who testifies in federal court against the closing of a city hospital, violative of the redress of grievances and freedom of assembly components of the First Amendment?

3. Is a district court authorized to award summary judgment to defendant municipal employer and administrators, if, in the light of actions the court concedes were retaliatory, including a letter of reprimand for protected speech on matters of public concern , which actions the court considers to be "ephemeral," on the basis that the court perceives no damages as matter of law?

II. PARTIES:

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

RICHARD J. McALLAN,

Petitioner,

- against -

JAMES T. KERR, individually and as Executive Director, Emergency Medical Service, New York City Health and Hospitals Corporation, CARLOTTA BRANTLEY, individually and as former Vice President for Corporate Affairs, New York City Health and Hospitals Corporation, STANLEY BREZENOFF, individually and as former President of the New York City Health and Hospitals Corporation, and also as Deputy Mayor of the City of New York, ALEXANDER KUEHL, M. D., as

Vice President of Emergency Medical Service New York City Health and Hospitals Corporation, WILLIAM LEASK, individually and as Labor Relations Director, Emergency Medical Service, New York City Health and Hospitals Corporation, ROBERT BECKER, individually and as Chief of the Emergency Medical Service, New York City Health and Hospitals Corporation, JOHN MCLAUGHLIN, individually and as former president of the New York City Health and Hospitals Corporation, JO IVEY BOUFFORD, M. D., as President of the New York City Health and Hospitals Corporation, THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, JUAN ORTIZ, individually and as former Personnel Director of the City of New York, VICTOR BOTNICK, individually and as former Special Assistant to the Mayor of the City of New York and as former Chairman of the New York City Health and Hospitals Corporation, THE CITY OF NEW YORK, and all other as yet unidentified agents of the City of New York who have acted in violation of the rights oithe Petitioner herein.

Respondents.

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IV. OPINIONS BELOW.

The decision of the 2d Circuit Court of Appeals dated November 4, 1991, (A-1) denied a petition for rehearing of the order of that court dated July 28, 1991 (A-3) which order affirmed the granting of summary judgment dismissing the complaint by the United States District Court, Southern District of New York, (Index 84 Civ. 0671 [TPG] Griesa, J) dated December 17, 1990. (A-6) The orders of the 2d Circuit and of the district court are not officially reported, and the 2d Circuit order of affirmance dated July 29, 1991 specifically provides that it not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before that or any other court. (A-5)

V. JURISDICTIONAL STATEMENT

Jurisdiction in the district court was founded on 42 U.S.C. Sec. 1983 and Sec. 1985(3). (A-7). The granting of summary judgment to the Respondents herein was timely appealed to the United States Circuit Court for the Second Circuit which rendered a decision July 29, 1991 (A-3) and a timely motion for rehearing containing

a suggestion that the action be reheard in banc was timely filed and denied on November 4, 1991 (A-1). Jurisdiction of this court is invoked under 28 U. S. C. 1254 (1). This petition is being filed within the time allowed by law.

CONSTITUTIONAL PROVISIONS AND LAWS

Amendments I, V, and XIV to the *United States Constitution* are set forth in the appendix. (A-45) Sections 1983 and 1985(3) of *42 United States Code* are set forth in the appendix. (A-46) Article 78 of *The Civil Practice Law and Rules of the State of New York (CPLR)* is set forth in the appendix. (A-48) Sections 12-305 and 306 of the *New York City Collective Bargaining Law* are set forth in the appendix. (A-50).

VII. STATEMENT OF THE CASE

The United States District Court for the Southern District of New York (Griesa, J.) granted summary judgment dismissing Petitioner's complaint. (A-6) This dismissal was affirmed by the Second Circuit Court of Appeals. (A-3).

The complaint alleged jurisdiction based on 42 U.S.C. Sec. 1983 and Sec. 1985(3) in that persons acting under color of state right were violating the Petitioner's First Amendment right of Freedom of Speech, Association and Petition. The Complaint also set forth alleged violations of the Fifth and Fourteenth Amendments based on the Defendant's tortious interference with the due process rights of the Petitioner. (A-9, A-17).

The Petitioner was and is a civil service permanent employee of the New York City Emergency Medical Service (EMS), a division of the New York City Health & Hospitals Corporation (HHC). During a portion of the time under review Petitioner was an officer of the union representing Emergency Medical Technicians and Paramedics employed by EMS.

As a Paramedic who was directly involved in responding to life-threatening "911" emergencies and the delivery of Advanced Life Support to critically ill or injured patients, the Petitioner became aware of life threatening problems in the agency. Beginning in 1980, the McAllan spoke out concerning the quantity and quality of EMS coverage in an attempt to increase the patient care resources of his emergency medical agency. These efforts touched on:

a) the heavy "backlogging" of emergency calls due to severe personnel and equipment shortages which at times resulted in critical patients waiting an hour or more for pre-hospital emergency care to arrive; (A-8, A-20)

b) unnecessary pre-hospital patient deaths due to the above life-threatening delays in EMS response to critical patients during high call volume periods; (A-8, A-20)

c) The fact that, in 1981, NYC EMS had still not computerized their dispatch center, thus unnecessarily slowing EMS emergency response time; (A-8, 20)

d) the purchase, by New York City EMS, of additional substandard ambulances in 1981 that did not meet applicable federal standards then in effect for ambulance vehicle safety and operational capability; (A-7 & A-8)

e) the assertion that, in 1979 and 1980, the Health & Hospitals Corporation had fraudulently certified, to the Federal Government, that their fleet ambulances were compliant with applicable federal regulations in order to obtain millions of dollars of EMS system funding from the Federal Government; (A-7, A-8)

f) the fact that the Health & Hospitals Corporation had failed to administer constitutionally mandated civil service exams and that a vast majority of EMS employees were serving provisionally in their respective titles. (A-8, A-34).

On a number of occasions the Petitioner testified before New York State Assembly and New York City Council oversight committees respecting efficiency and response time problems of the agency. (A-7 & 8) Petitioner cooperated with the New York City Department of Investigation concerning their investigation of federally substandard ambulance purchases by EMS/HHC. Petitioner also cooperated with the Office of the City Council President with respect to their investigation of "Prestige" ambulance breakdowns in the early 1980's which included such life-threatening defects as structural member failures caused by substandard welding as well as vehicle electrical fires caused by substandard wiring. (A-7 & 8)

In addition, Petitioner testified in federal court, as a subpoenaed witness, against the closing of Sydenham Hospital, which at the time was a city hospital serving the Harlem community in Manhattan. Petitioner gave various interviews to the local news media concerning the life-threatening difficulties EMS was experiencing as a result of fiscal crisis cutbacks. (A-7 & 8).

Petitioner participated in various grievance proceedings concerning employee safety and other labor-management issues in EMS. Petitioner also filed a number of Improper Practice Petitions with the New York City Office of Collective Bargaining in attempt to

clear his name--and save his job--within EMS after a protracted campaign of harassment was allegedly undertaken against the Petitioner. (A-8).

Finally, Petitioner sought to redress the civil service violations in the New York State Courts. In 1982, McAllan filed an Article 78 in New York State Supreme Court that sought to bring an end to HHC's civil service violations. In McAllan v. City, Justice Myers ruled that: "The undisputed allegations with respect to the number of provisional employees vis a vis permanent employees, their length of service in that capacity, and the failure to hold examinations for 3 of the 4 titles in over eight years, bespeaks a less than diligent observance of the mandates of the New York State Constitution and Civil Service Law. Such prolonged failure is difficult to conceive as accidental or negligent." (A-38 & 39). [Following a unanimous affirmance in the Appellate Division affirming trial on the issue of good faith, a settlement of this lawsuit was reached before trial which restored certain reclassified EMS titles to permanent status in the agency. These violations formed the basis of a class motion in the instant proceeding which was later withdrawn following settlement of the state action before trial.] (A-8).

The instant complaint alleged that, as a result of the Petitioner informing the legislative, judicial, administrative and press representatives of these

matters of public concern a series of adverse personnel actions by the Respondents took place which were in retaliation for his exercising his First Amendment rights. (A-8).

On February 16, 1981, McAllan was interviewed on TV concerning the New York City Police Department's decision to stop issuing police radios to the EMS units. These police radios directly linked EMS units to NYPD units and dramatically improved EMS ambulance response to confirmed critical calls. In that interview McAllan criticized EMS's then badly outmoded method of dispatching ambulances and complained that this Police Department decision would "...cost people their lives..." (A-20).

The following day, February 17, 1981, Defendant Kerr, then the Executive Director of EMS, distributed a memo to the EMS work force stating that he was "making every effort" to get the police radios issued to the EMS units once again. (A-24) [The police portables were re-issued to the EMS units approximately forty-eight hours following the TV interview.]

Additionally, on February 17, 1981, just prior to a union election campaign in which Petitioner was a candidate, Defendant Kerr prepared a letter to the parent union's representative which complained of

McAllan's "extremely inappropriate behavior" as an "alleged representative of D.C 37's Local 2507." The letter went on to characterize McAllan as an "extremely disruptive employee" who had to be kept from "interfering in the routine operation of the Emergency Medical Service." (A-26).

On February 19, 1981, the Petitioner responded to the Lincoln EMS facility on an off-duty basis to represent certain members in his role as union officer. Prior to this date McAllan had functioned as a union officer in the same manner for six years without incident. However, on February 19, 1981 McAllan was ordered off the Lincoln Facility by Hospital Police who had been summoned by EMS supervision. The Hospital Police were under orders to arrest the Petitioner if he did not comply. A similar incident occurred at Lincoln EMS facility a few days later. (A-8 & 9).

It was alleged that the "disruptive employee" letter and the "Lincoln Hospital" incidents served to humiliate and discredit McAllan in the eyes of the union membership just before an election of officers. Following McAllan's loss in that election, McAllan was charged and reprimanded (in June, 1981) for the February 19, 1981 Lincoln incident. This reprimand remains in McAllan's personnel file. (A-13, A-32).

Years later, official EMS documents concerning these February 1981 Lincoln incidents surfaced at a dismissed colleague's court-ordered Personnel Review Board hearing held in connection with the substandard ambulance scandal. (A-9).

This withheld statement, which is dated February 19, 1981, was prepared by the Lincoln EMS Captain and stated that "...his boss which is EMS was the one that do not want him (McAllan) in the garage along with his Local President. [sic]". (A-29) Further, the statement affirms the fact that the location supervisors were ordered by EMS management to immediately summon the Hospital Police and have McAllan removed from the location under threat of arrest. (A-28).

After the above incidents occurred, McAllan tried to clear his name and protect his job by bringing various Improper Practice Petitions at the New York City Office of Collective Bargaining. Under the *New York City Collective Bargaining Law*, McAllan bore both the burden of proof and all expenses of prosecuting the hearing as the Petitioner advancing the Improper Practice Charge(s). (A-50 & 51) In connection with the first such charge, McAllan's privately retained counsel subpoenaed various documents from EMS/HHC. The February 19, 1981 Law memo, as well as certain other documents, were

withheld by the Defendants at the Lincoln incidents OCB hearing. (A-9) As a result, McAllan and his dismissed colleague failed to prove the Improper Practice Charge before the hearing was adjourned "sine die." The defendants also withheld other evidence from McAllan at certain other OCB proceedings. (A-9) The Improper Practice Charges were formally held in abeyance by OCB following the institution of this civil rights action.

In May 1982, McAllan responded to an emergency police radio call without first being able to notify the busy EMS dispatcher. McAllan's unit was involved in an accident enroute to this emergency assignment. No charges were filed by EMS against McAllan for eight months following this accident. However, one week subsequent to the submission of the NY Supreme Court civil service case and simultaneous with the filing of internal union charges concerning the Lincoln incidents, above, charges were preferred by Kerr against McAllan. (A-17, A-34) Kerr also refused to recuse himself as final decisionmaker in this civil service hearing.

It was alleged in the complaint that duly subpoenaed exculpatory evidence was withheld from McAllan in the administrative hearing. (A-9) When the withheld evidence was produced in this proceeding, the Appellate Division had already reviewed and

upheld the suspension penalty of 15 days against McAllan. McAllan was unsuccessful in reopening the Appellate Division proceeding. (A-17).

In February 1983, also immediately following the submission of the McAllan v. City lawsuit, McAllan and his Co-Petitioner partner were issued a violation for allegedly failing to give proper radio signals to the EMS dispatcher. A Communications tape search requested by McAllan's location Captain in accordance with normal EMS Operating Procedures was allegedly squashed by the EMS Chief of Operations. (A-41).

In 1984, while this proceeding was pending, McAllan was charged with "Misconduct" by EMS for giving an interview to a reporter concerning the impact of a voluntary hospital strike on EMS. (A-43) These charges were dismissed against McAllan only after McAllan formally advised EMS that he would assert his right to comment on a matter of public concern in the McAllan v. Kerr proceeding.

In 1984, it is alleged that Petitioner declined a promotion to Lieutenant. Accepting the promotion meant that McAllan would have to return to probationary status in the agency, making him vulnerable to demotion. Instead, it is alleged that the Petitioner has been forced to expend many thousands of dollars and a countless number of off-duty hours in

order to maintain his current civil service position in EMS.

The district court apparently concluded that the Petitioner's speech was protected under the First Amendment but it determined that the letter of reprimand, the suspension, the harassment campaign, or the embarrassment and humiliation were not legally cognizable damages. The Court dismissed the case as "entirely ephemeral" with "no indication of any legally cognizable injury." (A-13).

In its unpublished affirmance, the 2nd Circuit observed that: "...The sole adverse employment action against appellant that is not barred by collateral estoppel involves a reprimand. However, nothing in appellant's papers indicates that this act had any concrete negative effect upon his employment status." (A-4).

A Petition For Rehearing was denied by the 2nd Circuit on Nov 4, 1991. (A-1).

VIII. REASONS FOR GRANTING THE WRIT:

The First Amendment protects the speech, association and petition of grievances rights of the Petitioner from retaliation by the government employer.

a.) Right To Comment on Matters of Public Concern:

It is well settled that persons do not relinquish their First Amendment rights to comment on matters of public interest by becoming public employees. Pickering v Bd of Education, 391 U.S. 563 (1968); Connick v Meyers, 461 U.S. 138, 148 n.7 (1983); Rankin v McPherson, 483 U.S. 378, 383-384 (1987); Harlow v Fitzgerald, 457 U.S. 810 (1981); Mt. Healthy City School Dist. Bd. of Ed. v Doyle, 429 U.S. 274 (1977).

This court has recognized that one of the essential purposes of the First Amendment is to provide society with a basis to make informed decisions about the government. This includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated

and all such matters relating to political processes. Mills v Alabama, 384 U.S. 214, 218-219 (1966); Garrison v Louisiana, 379 U.S. 64, 74-75 (1964) and Bond v Floyd, 385 U.S. 116, 136 (1966).

The balance of concerns expressed in Pickering, supra, is a determination of law to be made by the court. Connick, supra. Once it has been determined that the balance favors the employee, the question of whether the protected speech triggered retaliation, and if so, the extent of the damages suffered is a question of fact for the trier of the fact.

In this case the district court did not make a specific determination that the Pickering balance favored either the Petitioner or favored the Respondents. By implication it did indicate that the balance favored the Petitioner by its indicating that the allegations of the complaint were "entirely ephemeral and gave no indication of any legally cognizable injury." (A-13) To support the contention that the speech was protected the district court also observed that the Petitioner's various public criticisms of his employer go on uninhibited. The court recognized that a mild sanction was suffered as alleged in 43(f) but

added that there has been minimal adverse employment action against the Petitioner. (A-10 & 11).

Further, the 2d Circuit in affirming the district court commented that: "...The sole adverse employment action against appellant that is not barred by collateral estoppel involves a reprimand. However, nothing in appellant's papers indicates that this act had any concrete negative effect upon his employment status." (A-4).

Thus, both the district and circuit courts appear to agree that the speech was protected, and that there was adverse employment reaction to that speech but that there appeared to be little or no damages. Once, as here, the issue of the Pickering balance has been resolved in favor of the employee under Connick, supra, as a matter of law, the existence or extent of the damages remains a question of fact for the jury, thereby precluding the awarding of summary judgment to the employer. See, Memphis Community School Board v Stachura, 477 U.S. 299, 307 (1986) in which the Court once again ruled that a Defendant's breach of duty could give rise to compensatory damages that "...include[d] not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of

reputation, personal humiliation, and mental anguish and suffering..."

The opinion of the district court contains a recitation of the allegation of the amended complaint at A7-10, and a recitation of the Respondents' responses thereto at A10-A12. They set forth matters which involve questions of fact and are not amenable to the granting of summary judgment. On an appeal from a summary judgment, the appellate court reviews de novo whether any genuine issue of material fact remains for trial and whether the substantive law has been applied correctly. Inland Cities Exp., Inc. v Diamond Nat'l Corp., 524 F.2d 753, 754 (9th Cir. 1975). The record is assessed in the light most favorable to the party opposing summary judgment and all reasonable inferences are drawn in that party's favor. Ramseur v Chase Manhattan Bank, 865 F.2d 460, 465 (2d Cir. 1989). See also: United States v Diebold Inc., 369 U.S. 654, 655 (1962).

The long list of adverse personnel actions against the Petitioner, and his filing of grievances and lawsuits to exonerate his concerns, and the charges against, and penalties imposed on the Petitioner present issues

of fact making the award of summary judgment to the Respondents inappropriate.

This is particularly so when questions of motive predominate in the inquiry about how big a role the protected behavior played in the decisions of the employer. Without a searching inquiry into these motives, those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of post hoc rationalizations. Peacock v Duval, 694 F.2d 644, 646, (9th Cir. 1982); Eichman v Indiana State Univ. Bd. of Trustees, 597 F.2d 1104, 1108-1109 (7th Cir. 1979); Wilderman v Nelson, 467 F.2d 1173, 1176-1177 (8th Cir. 1972); Reichert v Draud, 511 F.Supp. 679 (1981), aff'd 701 F.2d 1168 (1983).

b.) Right to Petition for Redress.

The issue of whether the reactions of the employer here were in retaliation to the speech of the Petitioner is particularly important for this court to review because there are serious separation of powers and checks and balances considerations. Here some of the speech was before legislative oversight committees of both the New York State Legislature and the New York

City Council as well as before the courts. Moreover, they dealt with federal safety standards of ambulances and compliance with federal funding requirements as well as many other EMS system issues.

If considered by this court, executive branch employers will have the guidance necessary to define the appropriate response to testimony given by employees of the executive branch before legislative or judicial forums. Unthinking retaliation for such testimony could well serve to undermine the very foundations of government.

In Piesco v New York, 753 F.Supp. 468 (S.D.N.Y. 1990), rev'd 933 F.2d 1149 (2d Cir. 1991), cert denied ____U.S. ____ (1991) an employee of the executive branch was called to testify under oath before a New York State Senate oversight committee concerning police appointment examination matters. The 2d Circuit held that appropriate weight should be given in the Pickering balance to the forum in which the speech is given. The court observed that there exists an exceptional significance in the Pickering balance of an executive branch employee's interest in testifying truthfully before a legislative committee.

The court observed that the First Amendment does not require one to shade testimony before a legislative committee so as not to exacerbate a sensitive public issue, and that when responding to a question under oath, absent some privilege, a person has only the obligation to answer truthfully.

The court further observed that the need for honest and candid testimony takes on added significance when one appears before a legislative committee conducting an investigation which, under McGrain v Daugherty, 273 U.S. 135, 174 (1927), was held by this court to be an essential and appropriate auxiliary to the legislative function. The court went on to observe that requiring less than candor and honesty from witnesses appearing before legislative committees would undermine the very foundations of government which is predicated on an informed and enlightened legislature.

Thus the series of personnel actions taken against the Petitioner, even those which resulted in his exoneration, or which were not pursued to conclusion present an issue of fact for trial as to whether they were actions normally taken against employees or whether they were in retaliation for unfavorable comments made by the Petitioner before legislative

committees. See also: Patteson v Johnson, 721 F.2d 228, 231-233 (8th Cir. 1983), c.c.: 787 F.2d 1245, 1248 (8th Cir); cert denied 479 U.S. 828 (1986).

Nor are these considerations limited to legislative testimony. Judicial testimony has similar considerations as do those relating to dual sovereignty communications. In Vasbinder v Ambach, 926 F.2d 1333 (2d Cir. 1991) an executive branch employee of the state of New York made information respecting possible corruption available to the Federal Bureau of Investigation. The retaliation was held to be violative of the employee's First Amendment rights and cognizable as such under 42 U.S.C. 1983. See also Rookard v Health and Hospitals Corp., 710 F.2d 41, 46(2d Cir. 1983).

This court should also consider this case because there is a dispute between circuits which should be resolved. Thus in this case the 2d Circuit appears to hold, as a matter of law, that the extent of injury is a matter of law justifying the awarding of summary judgment to the employer even in the face of arguably retaliatory action for protected speech while the 6th and 7th Circuits consider the degree of actionable injury, if any, to be one of fact precluding the awarding

of summary judgment dismissing the complaint. Yoggerst v Stewart, 623 F.2d 35 (7th Cir. 1980); Knapp v Whitaker, 757 F.2d 827 (7th Cir. 1985); Columbus Education Assn. v Columbus City School District, 623 F.2d 1155 (6th Cir. 1980). It is believed that dispute was resolved by this court in Rutan v Republican Party of Illinois, 497 U.S. ____, (1990), in which the court ruled that First Amendment retaliatory action by a government employer was actionable even if such retaliation was "trivial" in nature. The 2nd Circuit refused to follow the teachings in Rutan.

In Yoggerst, a government employee made a causal remark in a telephone conversation with a fellow employee which was apparently derogatory to the director of her agency. She was not dismissed, but a verbal reprimand was administered followed by a letter of reprimand which was placed in her file. The court held that there were genuine issues of material fact both as to infringement and as to the protected nature of the speech; that the verbal reprimand and written memorandum placed in the personnel file might have a chilling effect upon the exercise of free speech. The court observed that if the speech was protected, it was

difficult to see how her right to indulge in it was not, as a matter of summary judgment, infringed.

c.) Right of Association.

Also in conflict with the decision of the 2d Circuit herein is the 6th Circuit in Columbus Education Assn., supra, which held that a reprimand constituted sufficient injury to constitute a legally cognizable claim. See also: Bart v Telford, 677 F.2d 622 (7th Cir. 1982) indicating that a campaign of harassment and ridicule through selective enforcement of work rules, even if that harassment and ridicule is not great, is actionable, and that small incidents collectively considered may result in substantial impairment. The fact that Petitioner had been a union official and was during part of the period running for union office makes the objected to conduct of the employer here a violation of the First Amendment component respecting the right to freely associate. Columbus Educational Assn., supra; Labov v Lalley, 809 F.2d 220 (3d Cir. 1987); Riechert v Draud, supra. The record below sets forth the allegation that the management of EMS sent a letter to the union expressing the view that the Petitioner was an "extremely disruptive" employee. This assertion was

made at a nominations meeting to parties then and there running against the Petitioner for union office, and was publicized to the union membership as a whole during the campaign period. (A-26).

The Respondents pleaded both the doctrines of res judicata and collateral estoppel in their Motion for Summary Judgment. (A-7) Even in the face of undisputed factual allegations that the Respondents withheld exculpatory evidence from the Petitioner in various administrative forums, the Respondents sought to penalize the Petitioner for the negative outcomes in these forums. Such an unconscionable position on the part of the Respondents clearly violates the basic tenet of "fair play" that would be expected in any due process proceeding. Morgan et al. v United States et al., 304 U.S. 1, (1937). In addition, the Petitioner asserted that the agency director, who had charged and penalized McAllan in an attempt to silence an agency activist, was a biased decisionmaker who had a impermissible interest in the outcome of these decisions. See: Withrow v Larkin, 421 U.S. 35, 46-47 (1975).

Nevertheless, the district court and the court of appeals applied the doctrine of collateral estoppel to one of the allegations of the complaint on the ground that the Petitioner had sought judicial review in the state courts and the particular employer action concerning that instance was upheld. The fact that the respondents below did not plead res judicata or collateral estoppel in their answer should have precluded the district court from applying the doctrine with respect to allegation 43(f) of the complaint. FRCP Rule 8; Evans v Syracuse City School District, 704 F.2d 44 (2d Cir. 1983).

Even were affirmative pleading of such defenses not a requirement, or even if they had been timely interposed, the fact that the Petitioner had brought a proceeding to have state judicial review of the disciplinary proceeding which resulted in an affirmance does not foreclose the matter to the Petitioner. In the first instance, to sustain an administrative agency's disciplinary determination in New York, the employer need only show that "substantial evidence" exists in order to sustain the determination complained of under Article 78, *N.Y. Civil Practice Law and Rules.* Under

42 U.S.C. 1983 a higher standard of proof, that is, a fair preponderance of the credible evidence, is the required quantum of proof in order to sustain the actions of the employer. Moreover, previously withheld evidence would now be available to the Petitioner in this proceeding to support his allegations of selective enforcement of EMS regulations. (A-17, A-28) Finally, the Second Circuit has specifically ruled that an Article 78, CPLR proceeding brought in New York State is not equivalent to an action under 42 U.S.C.1983. Davidson v Capuano, 792 F.2d 275 (1986). See also: Lawrence v McGuire, 651 F.Supp. 312 (S.D.N.Y. 1987).

With respect to de minimus damages perceived by the courts below to have been visited upon the Petitioner, the legislative purpose of 42 U.S.C. 1983 is to redress claimed violations of constitutional rights. As an expression of legislative intent that such violations be pursued, regardless of the quantum of actual injury, Congress has provided for the payment by a state defendant of reasonable attorney fees upon the successful proving of the case. If it is shown, as it was here, that there was a violation of the First Amendment by retaliatory adverse personnel action, but that the court can dismiss the complaint because the court

perceives the damages to be nominal or non-existent as a matter of law rather than as a matter to be determined by the trier of the facts, it is doubtful if attorneys would be willing to undertake the litigation under such circumstances. Carey v Piphus, 435 U.S. 247 (1978).

The finding of retaliation herein coupled with the view that there was minimal or no damages would, as here, lead to a dismissal of the complaint and thereby encourage continuation of the constitutionally objectionable conduct on the part of the employer. It is important to note that the district court also did not exercise its powers of equitable jurisdiction in the instant case even after making a finding of fact that the Petitioner had indeed been issued a reprimand for protected activity. See: Knapp v Whitaker, 757 F.2d 827, 846-847 (7th Cir. 1985). Thus, the district court foreclosed any realistic opportunity for the Petitioner to clear his name and repair his reputation in the emergency medical community.

Moreover, the fact that a court perceives a retaliatory act, such as charges resulting in a written

reprimand, to be of no or minimal import thereby justifying the awarding of summary judgment to the employer, does not adequately address the fact that any adverse personnel action of a retaliatory nature imposed for the exercise of a constitutional right could have a "chilling effect" on the exercise of that right. This would not only deprive the employee of his right to speak out on matters of public concern within the confines of Pickering and Connick, supra, but would deprive the other branches of government, the press and the public of the opportunity to gain information about the operations of government which they have a right to have.

There is also serious concern respecting whether the lawsuit, by the Petitioner, regarding the employer's refusal to administer civil service employment examinations and other classification matters, which was settled before trial, (A-8, A-34) was a precipitating factor in the alleged retaliatory practices. The fact that a case is settled before trial does not mean that the resentment or fall out of the litigation does not, as a matter of law, abate, or that it does not translate into retaliatory practices by the employer.

Along with the protected free speech component of the First Amendment, there is the redress of grievances component. A lawsuit against a governmental authority is nothing more than a petition for redress of grievances. The fact that the case was settled merely resolves the issues of the case before the court at the time. Any adverse personnel action which is precipitated by the fact that the litigation was instituted in the first place would amount to attaching a penalty to the exercise of a constitutional right and would be a cognizable as a cause of action under 42 U.S.C. 1983. If a jury concludes that the complained of adverse personnel retaliatory action and the penalties imposed thereon were in whole or in part a retaliatory response by the employer to the exercise of the employee of the First Amendment right to petition for redress of grievances in the courts, damages could be assessed under 42 U.S.C. 1983. Harrison v Springdale Water & Sewer Commission, 780 F. 2d 1422, (8th Cir. 1986) This reasoning applies with equal force to the act of petitioning an administrative agency for relief, as was also the case herein. See: California Motor Transport Co. v Trucking Unlimited, 404 U.S. 508, 510 (1972).

It has thus been shown that retaliatory action by a public employer against an employee's expression of matters of public concern can, as here, violate the free speech, the free association, and the redress of grievances components of the First Amendment. It has further been shown that there is a conflict among the circuits as to whether in the face of a finding of retaliatory action, the nature and extent of the injury is a matter of fact precluding summary judgment or, as here, is a matter of law permitting it.

In the face of these considerations and the need for public administrators to be forewarned of the law respecting impermissible retaliatory actions, the petition should be granted. Unless there is a firm decision of nationwide implication, administrators will be able to escape personal liability by asserting that their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known," the prerequisite enunciated by this court in Harlow v. Fitzgerald, supra, at 818.

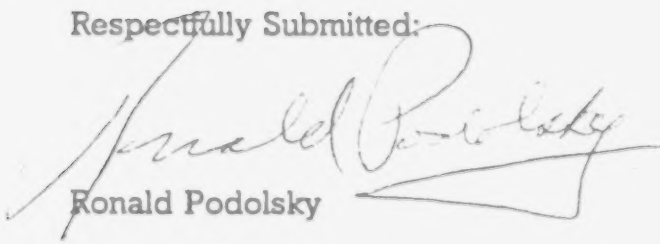
This Court should indicate that the right to speak out on matters of public importance, especially in the legislative or judicial forum, the right of free association and the right to seek redress of grievances

may not serve as a basis for retaliatory action, irrespective of the quantum of perceived injury, and that such retaliation is actionable under 42 U.S.C.1983. This issue, coupled with the dispute between circuits, justified granting the Petition.

VIII. CONCLUSION: The Petition for Certiorari should be granted.

Dated: January 29, 1992

Respectfully Submitted:



Ronald Podolsky
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fourth day of November, one thousand nine hundred and ninety-one.

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Richard J. McAllan,

Plaintiff-Appellant,

v.

James T. Kerr, et al,

Defendants-Appellees.

----------x

DOCKET NUMBER: 91-7069

Filed: November 4, 1991

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant Richard J. McAllan,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith

Clerk

SDNY 84-CV-0671 Griesa RKW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of July, one thousand nine hundred and ninety-one.

Present:

Honorable Ralph K. Winter,

Honorable Frank X. Altimari,

Honorable J. Daniel Mahoney,

Circuit Judges.

RICHARD J. McALLAN,

Plaintiff-Appellant,

v.

ORDER

91-7069

JAMES T. KERR, et al.,

Defendant-Appellee.

Filed: July 29, 1991

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

We affirm for substantially the reasons stated in Judge Griesa's opinion of December 17, 1990. The sole adverse employment action against appellant that is not barred by collateral estoppel involves a reprimand. However, nothing in appellant's papers indicates that this act had any concrete negative effect upon his employment status.

Hon. Ralph K. Winter, U.S.C.J.

Hon. Frank X. Altimari, U.S.C.J.

Hon. J. Daniel Mahoney, U S.C.J.

N. B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

RICHARD J. McALLAN, :

Plaintiff, :

-against- :

JAMES T. KERR, et al., :

Defendants. :

----------X

OPINION

84 Civ. 0671 (TPG)

This is an action by a New York City employee against the City and various of its officials. During the long history of this action all claims, except the second cause of action in the amended complaint, have been disposed of. Although the amended complaint refers to a class action, this is now out of the case.

The remaining claim, the second cause of action in the amended complaint, is brought under 42 U.S.C. SS 1983, 1985(3) and 1986 and alleges that defendants have harassed plaintiff, and have retaliated against him, in connection with the exercise of his First Amendment rights.

Defendants move for summary judgment, asserting that the claim is barred by res judicata or collateral estoppel, or that there is no triable issue of fact on the merits.

The Amended Complaint

McAllan has been employed by the Emergency Medical Service ("EMS") of the New York City Health and Hospitals Corporation ("HHC") since 1973. Beginning in 1980 and continuing through at least July 1986, when the amended complaint in this action was filed, McAllan has made numerous public statements critical of EMS and HHC concerning safety problems

with EMS's ambulances, HHC's labor policies, and many other issues regarding EMS and HHC. In doing so, McAllan has testified before the City Council and appeared on local television news. He made a number of Improper Practice Petitions to the city's Office of Collective Bargaining in the early 1980s challenging labor-management practices by HHC. In late 1983 he filed a lawsuit in state court challenging EMS's employment examination practices and its job-title structure. This suit was settled before trial.

The gravamen of the second cause of action is that HHC and EMS made a concerted effort to retaliate against him for the above activities and thus chill the exercise of his right of free speech.

The relevant allegations by McAllan are contained in paragraph 43 of the amended complaint. He alleges as follows:

43(a). After he gave an interview to a local television station concerning the poor response time

of EMS, the agency issued an order banning him from EMS facilities unless he was on duty, which order McAllan says he was never informed of. McAllan alleges that he was threatened with arrest on two occasions before a union election and that he was unjustly charged and reprimanded after the election.

43(b). EMS wrote a letter to a union official calling McAllan "disruptive." McAllan claims that the letter was intended to hurt him in his campaign to become president of his union.

43(c). HHC withheld exculpatory evidence from him at certain Office of Collective Bargaining hearings.

43(d). An HHC vice president was quoted in a union newspaper stating that McAllan was a dissident, after a certain lawsuit was filed against HHC and EMS.

43(e). McAllan was charged with not giving proper signals to a dispatcher, and defendants

"prevented" an investigation that might have cleared him of the charges.

43(f). McAllan was charged with improper response to an assignment.

43(g). McAllan was charged with misconduct following a press interview.

43(h). Unnamed persons at EMS referred to certain unpopular payroll deductions as "McAlian days."

43(i). One of the defendants "publicly disparaged" McAllan about newspaper leaks.

The following are defendants' responses, which are in fact fully supported by the record. As to 43(a), there is no indication that McAllan was actually denied access to EMS facilities in any way that prevented any activities by him. As to the threatened

arrest, it was not actually carried out. It is true that he was charged and reprimanded by EMS, but the reprimand is the lowest form of discipline possible. There is no showing that it constituted any injury to McAllan which could possibly be the basis for a damage award. Moreover, he had a right to file a grievance, which he did not do.

As to 43(b), 43(d), 43(h) and 43(i), there is no indication of any injury whatever.

With regard to the hearings referred to in 43(c), no adverse decision was rendered against McAllan as a result thereof.

As to 43(e), all that happened was counselling by McAlian's immediate supervisor. There was no injury to McAllan.

With regard to 43(f), it is true that McAllan was charged by EMS in February 1983 with

improper response to an assignment. There was a full hearing after which a 15-day suspension without pay was imposed on McAllan. He brought an Article 78 proceeding in December 1983. The Appellate Division, First Department confirmed the disciplinary action.

As to the charge referred to in 43(g), it was dismissed at a preliminary conference, and no injury to McAllan resulted.

DISCUSSION

Defendants claim that the entire second cause of action is barred by res judicata or collateral estoppel on the basis of the Article 78 proceeding referred to above. However, it is clear that only the allegation in subparagraph 43(f) is barred, and this is under the doctrine of collateral estoppel.

However, the other allegations in paragraph 43 must also be dismissed. They are entirely ephemeral and give no indication of any legally cognizable injury. See Hollander v. American Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990).

McAllan's various public criticisms of his employer go on uninhibited. Except for the mild sanction he suffered as alleged in 43(f), there has been no actual adverse employment action against him. Indeed, he was offered a promotion in 1984 but turned it down.

CONCLUSION

The second cause of action in the amended complaint is dismissed. This terminates the entire action.

SO ORDERED.

Dated: New York, New York

December 17, 1990

THOMAS P. GRIESA

U.S.D.J.

SDNY 84-cv-0671 Greisa RKW

MANDATE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of July, one thousand nine hundred and ninety-one,

Present:

Honorable Ralph K. Winter

Honorable Frank X. Altimari,

Honorable J. Daniel Mahoney,

Circuit Judges.

RICHARD J. MCALLAN

Plaintiff-Appellant,

v.

JAMES T. KERR, et al.,

Defendant-Appellee.

ORDER

91-7069

Filed: July 29, 1991

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

ISSUED AS MANDATE:

OCT. 21, 1991

Pages 12 & 13 of "Statement of Facts" in Plaintiff's Memo of Law in Opposition to Defendants' Motion for Summary Judgment, Dated May 29, 1990.

***

On November 16, 1984, in response to request for discovery in this [McAllan v Kerr] matter, McAllan received certain documents. ***

On March 8, 1985, McAllan filed with the Appellate Division a Motion for Re-consideration of its February 1985 decision on the ground that he now had evidence showing that the charges were proffered as retaliation for his lawsuit challenging EMS' employment practices and his filing of internal union charges against Cpt. Law. The Appellate Division denied the motion for re-hearing. (Exhibit J to Goodman Affidavit.)

In moving for re-consideration, McAllan for the first time sought to rely on information revealed to him through discovery in this action, to wit, a buck slip dated February 3, 1983 from Jim Kerr to Ms. Brantley showing prior discussions between the Executive Director of EMS and Vice President of HHC concerning

both Lincoln Hospital incidents with an attachment showing Kerr and Brantley's possession of internal union correspondence relating to charges brought against Cpt. Law by plaintiff arising out of the Lincoln Hospital incidents. McAllan sought to persuade the First Department that these documents showed that Executive Director Kerr, authorized charges against McAllan arising from his May 1982 accident immediately after learning and in retaliation for McAllan's proffering of internal union charges against Cpt. Law. 7.

***

Footnote #7, Pages 13 and 14.

7 Kerr charges McAllan concerning the May 1982 accident on February 1, 1983, eight months after its occurrence, and the same day his office received from union sources written notice that McAllan had brought charges against Ms. Law in late 1982. (See, Complt. para. 43(f)). As McAllan stated in seeking reconsideration of EMS' 15 day suspension

against him based on this newly revealed information, which derived, of course, from discovery underway in this lawsuit, "Simply put, the timing of the charges being filed against McAllan could not be accidental." (Exhibit I to Goodman Affidavit, p. 10, para. 22). Indeed, available documentary evidence (Attachment M to McAllan affidavit) shows that the investigation into the signal charges and the recommendation to proffer charges against McAllan were final as of June 11, 1982, nearly seven months before charges were actually lodged.

Exhibit "B" of Plaintiff's Memo of Law in Opposition to Defendants' Motion for Summary Judgment.

February 16, 1981

Channel 7, WABC-TV News, 6:00 p.m.

Static over police radios. Paramedics at Emergency Medical Services claiming lives may be in danger because they are being deprived of equipment. The story, a subject of special assignment by Milton Lewis.

"Rush on the ambulance. We still haven't gotten it."

Milton Lewis: That is a common lament. Too few ambulances on New York City streets and too long a wait for one in case of an emergency. For the last several years paramedics and corpsmen have used police department radios hoping to cut down on the waiting time. They say the Emergency Medical Services radio system doesn't work well enough.

Rich McAllan: It takes too long. There are just plain phone lines to go through our dispatcher. There is no priority communications between the two major dispatch centers in the City of New York.

Milton Lewis: But last Friday, the 13th, Police Commissioner McGuire's office ordered cops to stop giving radios to EMS personnel. Medics say that was unlucky for the people of New York.

Rich McAllan: Taking away the police radios will cost people their lives. They will delay the calls reaching us. It will further cause us difficulties in getting confirmations from the police as to which calls are more serious and which calls perhaps are false alarms entirely.

Corpsman: I think that was a very bad move. That's my own personal opinion.

Milton Lewis: But the head of N.Y.P.D. Commications says the order does make sense.

NYPD: He could respond to the radio call that he heard as opposed to the radio call that his management determined he should respond to first.

Milton Lewis: This is a dispatching center where 911 calls come into police headquarters directly. When paramedics take the radio call directly off the police radio they thereby save a step of going through the EMS dispatcher in Maspeth, Queens. They save time thereby and maybe a life.

Jon Frank: Many times, maybe once a week, a minute can make the difference between life and death and this is the minute. We get that minute with the police radio. There are many people alive today because of that radio.

NYPD: They could get there faster but the problem is he may not be going where EMS wants him to go first. For example, he may determine that he should go to a stabbing whereas his management determines "let's send him first to the cardiac and then we'll send him to the stabbing."

Bruce Bell: If EMS demands that we go on this cardiac case that they have, we give that priority.

Policeman Whalen: In the long run, I would say that the public would suffer because of the response time, any delay could cost a life.

Milton Lewis: Now listen to this, since EMS and police rank and file are unhappy over this latest move involving radios, don't be surprised if the Acting Head of EMS, Jim Kerr, who took temporary command of the ambulance service after its directors were dumped last year, also winds up being dumped very shortly.

Exhibit "C" of Plaintiff's Memo of Law in Opposition to Defendants' Motion for Summary Judgment.

New York City Health & Hospitals Corporation

EMERGENCY MEDICAL SERVICE

55-30 58th Street

Maspeth, New York 11378

(212) 326-0600

February 17, 1981

PLEASE POST

TO: All E.M.S. Personnel

FROM: James T. Kerr
Executive Director (Acting)

SUBJECT : POLICE PORTABLE RADIOS

There has recently been controversy over the Police Department's decision to discontinue issuing Police portables to our units.

I believe that, when used properly, Police Department radios can be very advantageous for our units to have. I believed this when I wrote the E.M.S. Operating procedure on the use of scanners and Police radios, and I believe it today.

As a result of these beliefs, this administration is making every effort to secure a reversal of the current Police Department policy. At the present time we are working with the Police Department Communications personnel, Mr. Eric Mitchell, President of Local 2507, and others to get these portables back.

I ask your perseverance and continued cooperation in the interim.

JTK:ba

Exhibit "D" of Plaintiff's Memo of Law in Opposition to Defendants' Motion for Summary Judgment.

New York City Health & Hospitals Corporation
EMERGENCY MEDICAL SERVICE
55-30 58th Street
Maspeth, New York 11378
(212) 326-0060

February 17, 1981

Mr. Joseph Barriteau
Council Representative
District Council 37
140 Park Place
New York, New York 10007

Dear Mr. Barriteau:

On at least two occasions, once in the Brooklyn Boro Commander's office and again involving our efforts to rent a replacement facility for the Webster Outpost, Mr. Richard McAllen [sic] has exhibted extremely inappropriate behevior. Mr. McAllen's disruptive behavior reflects poorly both on the Emergency Medical Service and District Council 37.

While the two instances I have cited are the most recent, they are not the only ones involving Mr. McAllen as an alleged representative of DC 37's Local 2507. Mr. McAllen's actions reflect a breakdown of labor management relations.

I cannot condone Mr. McAllan's behavior, and I refuse to allow it to continue.

I ask your cooperation in keeping this extremely disruptive employee from interfering with the routine operation of the Emergency Medical Service. It is my hope that you wili take whattever action is necessary to insure thai Mr. McAllen does not do irreparabie damage to labor-management relations within the Emergency Medical Service.

Sincerely,

James T.Kerr
Executive Director (Acting)

cc: J. Marshall
J. Bowen
E. Mitchell

Exhibit "E" of Plaintiff's Memo of Law in Opposition to Defendants' Motion for Summary Judgment.

TO: Mr. J. McNally, Boro Commander

From: Capt. M. Law

Date: 2/19/81

Subject: Interruption of Roll Call

At 09:00 Lt Eversley was holding roll call when in drives Mr. McAllan with his private car. I went over to Mr. McAllan while he was still sitting in his car and ask him to please remove his car from the garage due to the fact that I was informed that he is not to be in any of the garages while off duty. Mr. Engstrom. Mr. Engstrom informed me that Mr. McAllan was here on official business for the union. I then informed Mr. Engstrom of the same about Mr. McAllan. I ask Mr. McAllan again to remove his car and Mr. Engstrom told Mr. McAllan again to pulled further down into the garage. After getting out of his car Mr. Engstrom & Mr. McAllan continued the shouting. Mr. Eversley could not conduct roll call because of this. I called Mr. McNally, B/C [Borough Chief] and informed him about this and ask him if he would please come

down because Mr. McAllan refused to leave. Mr. McNally informed me to call Hospital Police and have him removed. At 09:20 Hospital Police arrive at this office and I explained to them what the problem was. Hospital Police tried to talk to Mr. McAllan but could not reason with him. Mr. McAllan stated to them that he will have his boss contact me. I explained to the Hospital Police that his boss which is EMS was the one that do not want him in the garage along with his Local President. Mr. McAllan also informed the Hospital Police that he was going to call their boss. At 9:45 Mr. McAllan removed his car from the garage after he saw that the Hospital Police was staying. At 9:55 Mr. McNally arrived at this location and pulled his car into the garage. While doing this Mr. Engstrom & Mr. McAllan got into their cars and left the grounds. At 12:50 Eric Mitchell telephone the garage and I explained the problem. Mr. Mitchell again stated that Mr. McAllan is not to be in any garages while off duty until further notified. Mr. McAllan and Mr. Engstrom conduct was unbecoming and also unprofessional in their action. [sic]

Capt. M. Law Lincoln Garage

Exhibit "F" of Plaintiff's Memo of Law in Opposition to Defendants' Motion for Summary Judgment.

New York City Health & Hospitals Corporation
EMERGENCY MEDICAL SERVICE
55-30 58th Street
Maspeth, New York 11378
(212) 326-0600

May 12, 1981

Executive Order #29

Release of Information

It is the responsibility of all E.M.S. personnel to safeguard any and all information relating to the operations of this Service, in order to insure the patient's right of confidentiality as well as to comply with Health and Hospitals rules and regulations.

Therefore, any information obtained by reason of employment the Service is strictiy confidential and is not to be

released to any other agency without the express approval of the Executive Director or his designee. Furthermore, information obtained by reason of employment in the Service may not be used for the employee's personal benefit in any case. Under no circumstances will employees contact or speak with representatives of the news media about any aspect of this Service without the express approval of the Executive Director or his designee.

Any information concerning this Service released by any employee not designated by the Executive Director is in violation of this order and is subject to disciplinary action.

James T. Kerr
Executive Director (Acting)

JTK : smf

Exhibit "G" of Plaintiff's Memo of Law in Opposition to Defendants' Motion for Summary Judgment.

New York City Health and Hospitals Corporation

EMERGENCY MEDICAL SERVICE

55.30 58th Street

Maspeth, New York 11378

July 6, 1981

Mr. Joseph Dubowski

247-30 Northern Boulevard

Douglaston, New York 11363

Re: George Engstrom
Richard McAllan
Our Nos. LR81-032, LR81-033

Dear Sir:

Please be advised that your request for a hearing pursuant to Section 7:5 of the Civil Service Rules and Regulations of the Health and Hospitals Corporation, has been received in this office.

In accordance with HHC Personnel Rules and Regulations, an employee may appeal a penalty or punishment other than a reprimand. Consequently a Section 7:5 hearing will not be requested.

Attached find a photocopy of applicable Rule 7:5:7.

Yours truly,

James T. Kerr
Executive Director

JTK:jvd
Attach.

Exhibit "H" of Plaintiff's Memo of Law in Opposition to Defendants' Motion for Summary Judgment.

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

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In the Matter of the Application of

RICHARD McALLAN, ALFRED BECTON, JONATHAN FRANK, BARBARA TAYLOR, as employees of New York City Emergency Medical Service/ Health & Hospitals Corporation and as Citizens of New York State, on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

THE CITY Of NEW YORK: JUAN ORTIZ, as Personnel Director of the City of New York; and STANLEY BREZENOFF, as President of the New York City Health and Hospitals Corporation,

Respondents.

----------x

Index No. 27728/82

Calendar Nos.

43 and 45 of 1/26/83

Motion numbers 43 and 45 on the calendar of January 26, 1983 are hereby consolidated for disposition.

Motion number 43 is an Article 78 CPLR proceeding brought by employees of the New York City Health and Hospitals Corporation (HHC), members of the Ambulance Corpsman Occupational Group Title, pro se. They challenge HHC's practice of appointment and promotion of provisional employees without the use of competitive examinations as unconstitutional and arbitrary and capricious. Petitioners seek an order requiring that such competitive examinations be held within 90 days and appointments be made from the list derived therefrom.

Respondents cross-move to dismiss the application for failure to state a cause of action.

In motion number 45, petitioners submit an amended petition alleging additional objections to the practices of HHC. As a comsequence of the amendment of the petition, motion number 43 has been superseded. Respondent's continue to maintain that the amended petition does not state a cause of action. They base their argument upon factual allegations that the title structure for these employee-petitioners has been reclassified by HHC Personnel Order #082/27 dated January 11, 1983 and that pursuant to such reclassification, competitive examinations will be held sometime within the next year obviating the objections of petitioners to respondents' past practices. The reclassification it is alleged, is a proper exercise of the discretion of HHC and as such should not be judicially modified or set aside.

The Amended Petition repeats the first two causes of action of the earlier petition. In the first cause of action, Petitioners challange Respondents' continuing conduct of appointing or promoting provisional emloyees without holding competitive examinations as a violation of Article V, Section L of the New York State Constitution. The second cause of action alleges the refusal to conduct timely examinations for the series of title in question is arbitrary and capricious and violates Civil Service Law Section 65.2. The third and fourth causes of action allege new material charging that the HHC has acted in bad faith, and in violation of the Civil Service Law in its appointment and promotion of provisional employees and that the HHC should be estopped at this time from broadbanding reclassification in derogation of employees rights under the Civil Service Law.

Petitioners allege that the HHC employs in this group title 1050 corpsmen, that only 350 are permanent

civil service employees and that the remainder are provisionals. This fact is confirmed in respondents' affidavit. Moreover, some of these provisionals have been serving in this capacity for upwards of seven years and many permanent employees are serving as provisionals in higher titles. Respondent HHC has, in over eight years time, not pubiished civil service examinations for 3 of the 4 titles it now, post litigation, seeks to reclassify.

Respondents' position is that the reclassification wipes the slate clean and that the court sbould oniy look to whether such reclassification has a rational basis and that Petitioners' allegations of bad faith are merely conclusory. The court does not agree. A fair reading of the petition and supporting papers indicates sufficient factual detail to constitute a claim of bad faith and failure to perform duties mandated by law. The undisputed allegations with respect to the number of provisional employees vis a vis permanent employees, their length of service in that capacity, and the

failure to hold examinations for 3 of the 4 titles in over eight years, bespeaks a less than diligent observance of the mandates of the New York State Constitution and Civil Service Law. Such prolonged failure is difficult to conceive as accidental or negligent.

Moreover, the petitioners' challenge the timing and implementation of the classification. The amended petition was served on December 21, 1982. The reclassification was purportedly accomplished by HHC Personnel Orders #082/27 dated January 11, 1983, effective that date. The promulgation of the reclassification was in itself improper in that the required 10 day posting period was not observed. (Unconsolidated Laws, New York Health and Hospitals Corporation, Section 7390; Health and Hospitals Corporation Rule 8:3.) The HHC then issued Personnel Order #082/27-2A which amended HHC Personnel Order #082/27 to make the order effective March 6, 1983 after posting from February 23, 1983. This amendment must be deemed recognition

of HHC's failure to properly enact the reclassification in the first instance. Since the reciassification was not implemented in the manner prescribed by law prior to the submission of this application, it should not in any event serve to preclude petitioners' claims.

The petition states a cause of action in mandamus for ongoing violations of the Civil Service Law and the New York State Constitution. The respondents' cross-motion is without merit and is denied. The respondents have 20 days for service of a copy of this order within which to serve their answer.

Dated May 5th, 1983

Allen Murray Myers

J.S.C.

Exhibit "K" of Plaintiff's Memo of Law in Opposition to Defendants' Motion for Summary Judgment.

NEW YORK CITY HEALTH & HOSPITALS CORPORATION

Memorandum

To: Neil Mingrone, Chief
Manhattan Boro Command

Date: February 7, 1983

From: Cecil Belenfante, Capt.
Metropolitan Facility

Subject: Notice of Violation

Please be advised that I spoke with the crew that were assigned to 13-W on 1/21/83--Paramedic R. McCallen [sic] and B. Taylor.

They left Lenox Hill Hospital and were told by the dispatcher to stand by while other calls were given out. When the crew got back to Metropolitan to restock

they notified CB {Communications Bureau} of this by phone. It is debatable if they were holding back the proper signals but I would recommend that a tape search be made.

Thanks,
Cecil Belenfante.

In handwriting at botton of memo:

"Denied as per Chief Becker (Capt. Cervo advised.)
Initialed "NM."

Exhibit "O" of Plaintiff's Memo of Law in Opposition to Defendants' Motion for Summary Judgment.

New York City Health & Hospitals Corporation
EMERGENCY MEDICAL SERVICE
55-30 58th Street
Maspeth, New York 11378
(212) 326-0600

Date: August 16, 1984

***

Dear Mr. McAllan:

Attached is a Notice and Statement of Charges describing charges which have been preferred against you by the Corporation.

***

Your appearance is required on the date and time specified and you are notified that your failure to appear may be construed as an act of insubordination.

***

Yours truly,

William M. Leask

Assistant Director for Labor Relations

***

Exhibit A

Charge: MISCONDUCT

Specification:

You engaged in misconduct in that you failed to obtain permission of the Executive Director or his designee prior to being interviewed by the news media in that on July 18, 1984, an interview given by you was released by the New York Daily News under the byline of Patricia Clark, and you gave information on E.M.S. operations without authorized approval.

(E.O. #29 5/12/81, EMS-OP 101-1 #20)

UNITED STATES CONSTITUTION

Amendment I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof; or abridging the freedom of speech, or of the press; or the right to of the people peaceably to assemble, and to petition the goverment for a redress of grievances."

Amendment V.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

"No person shall be...deprived of life, liberty, or property, without due process of law."

Amendment XIV.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

****

Revised Statutes of 1871.

42 U.S.C. 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Revised Statutes of 1861.

42 U.S.C. 1985 (3) provides in pertinent part that:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such state or Territory the equal protection of the laws; ...in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

CIVIL PRACTICE LAW & RULES OF THE STATE OF NEW YORK

Article 78 of the Civil Practice Law and Rules (CPLR) states in pertinent part:

Sec. 7801. Nature of Proceeding.

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article.

Sec. 7802. Parties.

(a) Definition of "body or officer". The expression "body or officer" includes every court, tribunal, board, corporation, officer or other person, or aggregation of persons, whose action made be affected by a proceeding under this article.

***

Sec. 7803. Questions Raised.

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. A determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penality or discipline imposed;

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

****

COLLECTIVE BARGAINING LAW

ADMINISTRATIVE CODE OF CITY OF NEW YORK
(Revised 1986.)

Sec. 12-305.

Rights of public employees and certified employee organizations.

Public employees shall have the right to self-orgenization, to form, join or assist public employee organizations, to bargain collectively through certified employee of their own choosing and shall have the right to refrain from any or all such activities.

***

Sec 12-306.

Improper Practices; good faith bargaining.

(a) Improper employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in Section 1173-4.1 of this chapter.

(2) to dominate or interfere with the formation or administration of any public employee organization;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or particpation in the activities of, any public employee organization;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated prepresentatives of its public employees.

***

Supreme Court, U.S.
FILED
FEB 27 1992
OFFICE OF THE CLERK

No. 91-1250

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

RICHARD J. McALLAN,

Petitioner,

-against-

JAMES T. KERR, et al.,

Respondents.

(Full Caption Infra)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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February 26, 1992

*Counsel of Record.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the lower Courts properly determined that one or more of petitioner's claims in his amended complaint were barred by collateral estoppel, and that those claims which were not barred involved actions that resulted in no legally cognizable injury, no actual adverse employment action, and no concrete negative effect upon petitioner's employment status.

PARTIES:

No. 91-1250

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

RICHARD J. McALLAN,

Petitioner,

-against-

JAMES T. KERR, individually and as Executive Director, Emergency Medical Service, New York City Health and Hospitals Corporation, CARLOTTA BRANTLEY, individually and as Former Vice President for Corporate Affairs, New York City Health and Hospitals Corporation, STANLEY BREZENOFF, individually and as Former President of the New York City Health and Hospitals Corporation, and also as Deputy Mayor of the City of New York, ALEXANDER KUEHL, M.D., as Vice President of Emergency Medical Service, New York City Health and Hospitals Corporation, WILLIAM LEASK, individually and as Labor Relations Director, Emergency Medical Service, New York City Health and Hospitals Corporation, ROBERT BECKER, individually and as Chief of the Emergency Medical Service, New York City Health and Hospitals Corporation, JOHN McLAUGHLIN, individually and as Former President of the New York City Health and Hospitals Corporation, JO IVEY BOUFFORD, M.D., as President of the New York City Health and Hospitals Corporation, THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, JUAN ORTIZ, individually

and as Former Personnel Director of the City of New York, VICTOR BOTNICK, and as Former Special Assistant to the Mayor of the City of New York and as former Chairman of the New York Health and Hospitals Corporation, THE CITY OF NEW YORK, and all other as yet unidentified agents of the City of New York who have acted in violation of the rights of the Plaintiffs herein,

Respondents.

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No. 91-1250

IN THE
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RICHARD J. McALLAN,

Petitioner,

-against-

JAMES T. KERR, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Petitioner Richard J. McAllan has been employed, and continues to be employed, by the Emergency Medical Service ("EMS") of the New York City Health and Hospitals Corporation ("HHC") since 1973. Beginning in 1980, and continuing to the present, he

has made numerous public statements critical of EMS and HHC, concerning, among other things, HHC's various labor policies, and what he has perceived as safety problems with EMS's ambulances. He also brought a number of Improper Practice Petitions alleging HHC violations of labor-management practices to the City's Office of Collective Bargaining ("OCB") during the early 1980s, and in late 1983, he filed a state lawsuit challenging EMS's employment examination practices and later, its job-title structure.

In 1981, McAllan was charged with misconduct concerning an incident at Lincoln Hospital, and a reprimand was recommended at the Informal Conference held on that charge. Instead of grieving that determination, he filed an Improper Practice Petition with OCB over the incident. Although four days of hearings were held on the petition (which was amended in 1983),

McAllan did not permit OCB to come to any decision on it. In 1985, after filing this federal action, he persuaded OCB to stay further proceedings on that petition, and also on three others that he had filed over incidents he also raises in this federal lawsuit. Thus, he has not suffered any adverse outcome from the OCB proceedings on these incidents. In fact, in 1983, McAllan successfully took the promotional examination for the next job title in his career ladder, and was offered the promotion to the title of Supervising Emergency Medical Service Specialist when the resulting eligible list was issued in 1984. McAllan declined the promotion in July, 1984, however, stating in his letter that he could not accept it while he was in litigation with HHC.

In January 1983, McAllan was issued a Notice of Violation for having given improper signals to the EMS dispatcher. He was

"counseled" about this misconduct, and a notice of counseling was placed in his personnel file, along with his written rebuttal comments.

In mid-1982, McAllan was charged with an unauthorized response to a signal of another agency. The charge arose from an incident on May 23, 1982, in which McAllan improperly responded to a police radio signal without authorization from the EMS dispatcher, and became involved in an accident with the ambulance he was driving. After an informal conference in September, 1982, HHC served formal disciplinary charges in February 1983, and a full evidentiary hearing was held on May 10, 24, and July 10, 1983. The Hearing Officer determined on August 15, 1983 that McAllan was guilty of making an unauthorized response to the signal of another agency, but was not guilty of the charge of filing a

false report about the associated accident. The Hearing Officer recommended a 15-day suspension without pay, which EMS Director James Kerr accepted by letter dated August 26, 1983. In so recommending, the Hearing Officer noted several past pre-disciplinary "counselings" on similar offenses that were in McAllan's personnel file, and balanced them against several commendations. The prior counselings the Hearing Officer listed did not include either the 1983 notice for giving improper signals, or the reprimand for the Lincoln Hospital incident, neither of which had any relevance to the misconduct at issue or to its penalty.

Thereafter, in a pro se State court proceeding captioned McAllan v. Brezenoff, et al., brought pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") in New York County Supreme Court in December, 1983, McAllan sought to

set aside the determination finding him guilty of making an unauthorized response to a signal of another agency, and the penalty of suspension from duty for 15 days without pay. The Article 78 petition, transferred to the Appellate Division, First Department by order of transfer entered March 13, 1984, alleged that the disciplinary finding and penalty were invalid, partly because they exemplified a pattern of harassment and retaliation against McAllan by HHC and EMS, and were designed to punish him and deter him from his public criticisms of them. By order entered February 7, 1985, the Appellate Division, First Department unanimously confirmed both the determination and penalty imposed. McAllan v. Brezenoff, 108 AD2d 1103 (1st Dept., 1985).

In March 1985, McAllan moved for reargument, claiming that he had recently obtained additional evidence (partly through

his discovery in this federal action), which conclusively demonstrated that the challenged disciplinary proceeding was an example of HHC/EMS's continued harassment and retaliation against him. Among the facts he cited as evidence of the existence of the alleged pattern of harassment and retaliation were: HHC Vice-President Brantley had been quoted as calling him a "dissident" shortly after he filed the state court lawsuit in 1983; HHC had used Lincoln Hospital police against him during his union election campaign in 1981; EMS Director Kerr had brought disciplinary charges against him in 1983 after learning that McAllan had brought union charges against the Captain involved in the Lincoln Hospital incident. These same specific factual allegations were contained in the District Court complaint in this action, in ¶43(a), (d) and (f). On April 9, 1985, the Appellate Division, First Department

denied McAllan's motion to reargue in its entirety.

In 1984, McAllan was charged with misconduct for giving an unauthorized interview to the press. The charge was dismissed at the Informal Conference, because the Labor Relations officer concluded that McAllan had not intended to violate the patient confidentiality requirement of the Executive Order under which he was charged. That Executive Order was determined to be susceptible of misinterpretation, and was subsequently withdrawn and replaced with a more clearly-worded directive.

Early in the 1980s, HHC instituted a payroll deduction known as the "heat days" deduction. McAllan and others filed a grievance to preclude it, but lost. McAllan alleged in his complaint that the resulting payroll deductions were known as "McAllan

days" as part of HHC's campaign to denigrate him. EMS Labor Relations Director William M. Leask denied that he or anybody else at HHC or EMS has ever used such a characterization.

Before McAllan stayed his other OCB petitions in 1985, OCB had already decided two of McAllan's petitions that are somewhat related to the incidents alleged in this action. In Decision B-3-84, OCB found that in 1982, HHC had not taken any improper action nor had it taken any proper action from an improper motive, in its investigation of the charges of unauthorized response on which McAllan was eventually disciplined. Further, OCB found that HHC's actions could not have wrongly influenced the 1982 union election against McAllan. In Decision B-26-84, OCB found that the parent union and its representative for McAllan's local had not acted improperly nor infringed McAllan's

rights in disclosing a letter by EMS Director Kerr that characterized McAllan as a "disruptive employee," even though the disclosure was made during an election campaign period in 1981.

In sum, McAllan has not suffered any adverse personnel action, other than the single 15-day suspension that resulted from his own documented misconduct. That determination and penalty were upheld upon full judicial review, over McAllan's strenuously pressed claim that they were improperly motivated by the desire to retaliate against him. Nor has he been injured by having been required to respond to several charges of lesser misconduct, as none of those charges resulted in any disciplinary penalties, and the pre-disciplinary notices of counseling or reprimand that resulted have had no effect whatsoever on any subsequent personnel

action. McAllan has not incurred out-of-pocket expenses, either for the time spent at the pre-disciplinary sessions, Informal Conferences, or disciplinary hearings (since EMS's practice is to permit employees to attend such meetings on work time, without loss of pay or leave time), or for legal representation, which, where permitted, is provided without charge by the union if the employee so desires.

On or about November 13, 1986, McAllan served a District Court summons and amended complaint against the City of New York and various of its officials, which referred to a class action and asserted three causes of action alleging violations of the Civil Service Law and misuse of provisional appointments (first cause of action); claims that McAllan and others were harassed, punished and retaliated against for exercising their First Amendment rights

(second cause of action); and a violation of the Fair Labor Standards Act (third cause of action). During the extended history of this litigation, all claims except the second cause of action in the amended complaint have been withdrawn or disposed of, and the class action is no longer an issue in this case.

On or about May 4, 1990, respondents moved for summary judgment on the remaining claims asserted in the second cause of action, on the grounds that, as a matter of law: (1) McAllan's claim of retaliation and harassment for the exercise of his First Amendment rights was barred by res judicata and/or collateral estoppel; (2) McAllan failed to state any claim for defamation; and (3) McAllan failed to state a claim for retaliation because he did not sustain any injury proximately caused by any alleged wrongful acts of defendants.

By opinion and order dated December 17, 1990, the United States District Court for the Southern District of New York (GRIESA, U.S.D.J.) dismissed the second, and only remaining, cause of action in the amended complaint, thereby terminating the entire action (A6-A14).[1] The Court noted that the gravamen of the second cause of action was that HHC and EMS had made a concerted effort to chill McAllan's exercise of his right to free speech by retaliating against him for making public statements critical of EMS and HHC, and for challenging HHC's labor management practices and EMS's employment examination practices and job-title structure. After reviewing the relevant allegations of the

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[1] Numbers in parentheses preceded by the letter "A" refer to pages in petitioner's Appendix annexed to the Petition for A Writ of Certiorari.

amended complaint set forth in ¶43, and respondents' responses to the allegations, the District Court noted that the responses to such claims were in fact fully supported by the record. With respect to ¶43(a), 43(b), 43(c), 43(d), 43(e), 43(g), 43(h), and 43(i), the Court observed that McAllan had suffered no injury which could be the basis of a damage award, as a result of the actions alleged. With regard to ¶43(f), the Court noted that McAllan had challenged, in an Article 78 proceeding in December 1983, the 15-day suspension without pay, imposed after a full evidentiary hearing, for the charge of improper response to an assignment, which disciplinary action was confirmed by the Appellate Division, First Department.

The District Court held that the allegation in ¶43(f) of the amended complaint was barred under the doctrine of collateral

estoppel (A12). The Court further ruled that the other allegations in ¶43 had to be dismissed, as they were "entirely ephemeral" and without any "indication of any legally cognizable injury" (A13). The Court concluded that McAllan's various public criticisms of his employer proceed uninhibited; except for the mild sanction of the 15-day suspension without pay, as alleged in ¶43(f), there has been no actual adverse employment action against him; and he was offered a promotion in 1984, which he declined to accept. The District Court thereupon dismissed the second, and only remaining, cause of action in the amended complaint (A13).

By order filed July 29, 1991, the United States Court of Appeals for the Second Circuit affirmed the District Court's December 17, 1990 opinion, substantially for the reasons stated therein (A3-A5). The

Second Circuit Court of Appeals added that "[t]he sole adverse employment action against appellant that is not barred by collateral estoppel involves a reprimand," and concluded that nothing in McAllan's "papers indicates that this act had any concrete negative effect upon his employment status" (A4).

By order filed November 4, 1991, the Second Circuit Court of Appeals denied McAllan's petition for rehearing (A1-A2).

REASONS FOR DENYING THE WRIT

Petitioner has failed to set forth any important, special or compelling reason for granting his petition for a writ of certiorari. As in the Courts below, he has wholly failed to demonstrate any legally cognizable injury or violation of his First Amendment rights. The Courts below correctly determined that any claims not barred by collateral estoppel resulted in no concrete negative effect upon

his employment status, and no actual adverse employment action against him.

The District Court properly determined that the allegation in Complaint ¶43(f), in which McAllan alleged that he was charged with improper response to an assignment, as retaliation for expressing his First Amendment rights in filing charges against certain union officers, was barred by collateral estoppel. That charge arose out of the May 23, 1982 incident, as a result of which an informal conference was held in September, 1982; formal charges were served in February, 1983; a full evidentiary hearing was held on May 10, 24, and July 10, 1983; a report and recommendation (for a finding on one charge and penalty of a 15-day suspension without pay) was issued on August 15, 1983 and accepted by EMS Executive Director Kerr by letter dated August 26, 1983; McAllan brought an Article

78 proceeding in State court, challenging the finding and penalty; and the proceeding was transferred to the Appellate Division, First Department, which confirmed the finding and penalty on February 7, 1985. McAllan v. Brezenoff, 108 AD2d 1103 (1st Dept., 1985). In his State court Article 78 verified petition, verified reply, Appellate Division brief, reply brief, and motion for reargument, McAllan consistently alleged that this disciplinary determination was invalid and merely an example of the same alleged pattern and campaign of harassment and retaliation for his outspoken criticisms of management and EMS ambulance safety standards. Thus, McAllan's claim in ¶43(f) that the disciplinary proceedings and penalty were unfounded or otherwise improperly motivated by harassment and retaliation has been fully litigated and reviewed in state court, and decided adversely to him. The

issue thus may not be relitigated in this subsequent federal action. See, e.g., Migra v. Warren City School District, 465 US 75, 85 (1984) (state court judgment has same preclusive effect in federal court as it would have in state courts); Murphy v. Gallagher, 761 F2d 878, 881-82 (2d Cir. 1985); Kendall v. Avon Products, Inc., 711 F.Supp. 1178, 1182 (SDNY 1989). McAllan is precluded by collateral estoppel from asserting any issues concerning the validity of the disciplinary proceeding, finding, and penalty, which have already been raised, fully litigated, and upheld in McAllan v. Brezenoff, supra, and the same issue asserted in ¶43(f) of the amended complaint is thus barred from further consideration in this action.

McAllan has also litigated his basic claim that HHC and EMS have harassed and retaliated against him for his criticisms of their management, in proceedings before the

City's Office of Collective Bargaining ("OCB"). During the early 1980's, he filed a number of Improper Practice Petitions containing this basic claim, each one alleging a different factual scenario. Two of the petitions which involve allegations related to those asserted here, OCB Decisions B-3-84 and B-26-84 (involving events alleged in Complaint ¶43(b) and (f)), were decided by OCB in 1984, both adversely to McAllan. Although he could have sought judicial review of those decisions through an Article 78 petition, he chose not to do so, and the OCB Decisions may thus be regarded as final. In Decision B-3-84, OCB denied McAllan's claim that "EMS upper management" had improperly attempted to sway the 1982 union local election against McAllan by its investigation of the incident that ultimately led to the discipline that was upheld in McAllan v. Brezenoff (Complaint ¶43(f)).

After careful review, OCB found "no evidence either of improper acts or of proper acts improperly motivated." In Decision B-26-84, in which McAllan had alleged that the representative of the parent union had tried to sway the local's membership against McAllan during the 1981 election by revealing to them that EMS Director Kerr had sent a letter characterizing McAllan as a "disruptive employee" (the same claim made in Complaint ¶43(b)), OCB found that the record failed to show how these statements interfered with, restrained, or coerced McAllan in connection with his exercise of protected rights, and denied the petition. These decisions by an administrative tribunal may be given collateral estoppel effect as to the legal issues and facts decided. The final decision of an administrative tribunal may be entitled to res judicata effect against a plaintiff who attempts to raise the same claims in a

subsequent federal action. See, e.g., Kirkland v. City of Peekskill, 828 F2d 104, 110 (2d Cir. 1987) (barring relitigation of claims decided adversely to plaintiff in a State Division of Human Rights proceeding).

The Courts below also correctly held that the remaining allegations in Complaint ¶43 had to be dismissed, as they were entirely ephemeral and did not indicate any legally cognizable injury. To establish a claim for unlawful retaliation, the employee must demonstrate that (1) he was engaged in a protected activity; (2) the employer was aware of that activity; (3) some adverse employment action occurred to the employee; and (4) a causal connection existed between the protected activity and the adverse action. Hollander v. American Cyanamid Co., 895 F2d 80, 85 (2d Cir. 1990). As the District Court and Court of Appeals concluded, McAllan has wholly failed to

demonstrate that he incurred any actual injury from the acts complained of in his complaint, sufficient to raise a Constitutional claim.

In order to raise a claim upon which relief can be granted that respondents violated his Constitutional right to free speech without retaliation, McAllan would have to show that respondents did something that caused him some injury. Without an actual injury, no plaintiff can support a claim. See, e.g., Warth v. Seldin, 422 US 490, 515 (1975). Here, all that McAllan alleges is that respondents "engaged in administrative and other tactics designed either to discredit or to retaliate against McAllan..." Complaint ¶43.

In Complaint ¶43(a), McAllan referred to an incident at Lincoln Hospital in February 1981. An Informal Conference conducted by William M. Leask, EMS Director

of Labor Relations, was held on June 19, 1981 about this incident. After hearing from witnesses in support of the complaints of "Conduct Unbecoming an E.M.S. Employee" and "Loitering," and from McAllan and other witnesses in opposition, Mr. Leask determined that the charges were founded and deserving of a reprimand. McAllan did not continue with the grievance procedure, and HHC did not bring further Rule 7.5 charges, so the Informal Conference was the end of this process. As the District Court noted, there is no indication that McAllan was actually denied access to EMS facilities in any way that prevented any activities by him. He also claimed he was "threatened with arrest," but no arrest was actually effectuated. Finally, McAllan could have filed a grievance from the reprimand, but failed to do so.

Columbus Education Association v. Columbus City School District, 623 F2d 1155, 1159, 1160 (6th Cir. 1980) (Writ Petition at 22) is inapposite, since in that case, there was an undisputed connection between the plaintiff's advocacy as a union spokesperson of a fellow teacher's complaint, and the letter reprimanding him for "unacceptable conduct" in response to his representation of the fellow employee. The plaintiff's zealous advocacy was found to be a substantial factor in issuing the letter of reprimand, and the defendants had failed to offer any legitimate rationale for the reprimand. See also Yoggerst v. Stewart, 623 F2d 35, 40-41 (7th Cir. 1980) (Writ Petition at 21) (undisputed connection between the plaintiff's casual, apparently derogatory remark about director of State agency, and oral and written reprimand and denial of grievance; employment action against plaintiff

was found to be "a ponderously inappropriate reaction to a casual and innocuous comment"). By contrast, in the case at bar, McAllan was reprimanded for conduct unbecoming an EMS employee, due to disorderly and disruptive behavior, and loitering. McAllan does not demonstrate or present any proof that the letter of reprimand was unfounded, connected to his outspoken criticisms of EMS management, or issued to retaliate against his constitutionally protected, First Amendment rights to freedom of speech or association. Nor has he alleged or proven any adverse impact, or come forward with any evidence of injury based upon the reprimand. As the Court of Appeals observed, nothing in McAllan's papers (or, for that matter, in the instant Writ Petition) indicates that this reprimand "had any concrete negative effect upon his employment status" (A4). Nor does he

demonstrate that the reprimand was unfounded, unjustified, or based upon a mere "trivial episode," as in Yoggerst v. Stewart, supra.

As to Complaint ¶43(b), in which McAllan alleged that Kerr wrote a letter in February 1981 to a union official calling McAllan "disruptive," and that the letter was intended to hurt him in his campaign to become union president (the same event which is the subject of OCB Decision B-26-84), there was no indication of any actual injury to McAllan.

As to Complaint ¶43(c), wherein McAllan alleged that HHC withheld exculpatory evidence at certain OCB hearings relating to the Lincoln Hospital incidents, no adverse determination had ever been rendered in those hearings or on the merits of the OCB petition. McAllan requested in 1985 that the

OCB proceedings be held in abeyance pending the outcome of this federal action.

As to Complaint ¶43(d), McAllan's allegation that an HHC vice-president was quoted in a union newspaper as labelling him a dissident after a certain lawsuit was filed against HHC and EMS, no injury whatsoever resulted to McAllan as a result of the alleged quotation.

As to Complaint ¶43(e), McAllan referred to a 1983 complaint that he did not give proper signals to a dispatcher, and claimed that defendants "prevented an investigation" that might have cleared him of the charge. McAllan's immediate supervisor counseled him about the violation, and McAllan wrote a rebuttal comment on the Notice of Counseling. Thus, all that occurred was actually pre-disciplinary "counseling," without penalty, further impact, or any injury to McAllan.

As to Complaint ¶43(g), McAllan alleged that he was charged in 1984 with "misconduct" following a press interview. This charge, however, was dismissed after the preliminary Informal Conference, and no injury to McAllan resulted. The Executive Order under which this charge was brought was later found to be susceptible of misreading, and has since been withdrawn and substituted with a more clearly worded directive.

As to Complaint ¶43(h), McAllan referred to a payroll deduction first imposed in 1983 and commonly known as the "heat days" deduction. As he correctly alleged, after he and others grieved the determination, HHC's position was upheld, and the deduction of annual leave time (or its cash equivalent) was permitted. Mr. Leask was unaware that the deduction had ever been referred to by anyone at EMS or

HHC as the "McAllan days," and in any event, McAllan alleged no injury whatsoever as a result thereof.

As to Complaint ¶43(i), in which McAllan alleged that one of the defendants "publicly disparaged" him about newspaper leaks concerning EMS, there is likewise no indication of any injury whatsoever to McAllan as a result of this alleged disparagement.

Thus, the only actual disciplinary penalty ever imposed on McAllan was the 15-day suspension without pay, arising out of the 1982 misconduct, which finding and penalty were conclusively upheld by the Appellate Division, First Department on February 7, 1985. No charge that can be alleged to be retaliatory has ever resulted in any adverse personnel action, or even any recommendation for such action. Only the charge referred to in ¶43(f) reached a formal

disciplinary hearing and imposition of a disciplinary penalty that was judicially upheld. The other charges have not resulted in any disciplinary action, adverse employment effect, or in McAllan being fired, demoted, suspended, transferred against his will, denied promotion, or even threatened with any such consequence. Mere speculation that at some future time, those of the pre-disciplinary complaints that still exist in his file might have some injurious effect is insufficient to state a claim. The injury must be real and immediate, rather than conjectural or hypothetical. See O'Shea v. Littleton, 414 US 488, 494 (1974).

Not only has there been no unjustified adverse personnel action against McAllan, but in fact, he was offered a promotion during the very period that he alleged defendants were engaging in harassment and retaliation against him. McAllan turned down

the offered promotion to the title of Supervising Emergency Medical Service Specialist, claiming in his July 8, 1984 letter that because of his pending litigation, he would find it difficult to function in a supervisory position. Affirmatively choosing to continue to perceive and present himself as a victim of his employers' retaliation and harassment, rather than to accept promotion and move forward with his career, does not support a claim of retaliation injury.

Nor has McAllan been injured by the mere fact that he was summoned to explain his conduct at several counseling sessions or Informal Conferences. He did not lose any pay on account of attendance at these discussions, which EMS employees are permitted to attend on working time. He did not have to incur any expense for defense counsel, since his union would provide

representation at no charge if requested to do so.

McAllan has consistently been treated by EMS even-handedly and like any other employee with respect to all personnel and disciplinary decisions. He has not been the target of any campaign of harassment or retaliation by any of the defendants. As the District Court noted, McAllan's various public criticisms of his employer continue unimpeded and uninhibited, and except for the mild sanction alleged in Complaint ¶43(f), there has been no actual adverse employment action against him. To the contrary, he was offered a promotion in 1984, but declined it. No case has been found in which a claim of retaliation for the exercise of constitutionally protected rights has been sustained without any proof of any actual injury having been incurred, rather than mere speculation that something might later occur.

CONCLUSION

It is respectfully submitted that petitioner has failed to sustain his burden of establishing that there are special and important reasons why the Writ of Certiorari should be granted. As the decisions of the Second Circuit and the District Court correctly apply well-settled legal principles to the facts of this particular case, they do not involve any important issues of alleged First Amendment violations which have not been, but should be, settled by this Court. Accordingly, petitioner has not demonstrated any reason why this Court should exercise its sound judicial discretion to entertain this

case. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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